Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of		
Effects of Communications Towers on Migratory Birds	)	WT Docket No. 03-187

To: The Commission

REPLY COMMENTS

Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP ("BMDDP"), on behalf of its antenna structure owner clients, pursuant to Section 1.415(c) of the Commission's Rules, hereby submits the following Reply Comments in the captioned proceeding. For the reasons stated below, BMDDP supports the comments filed by Land Mobile Communications Council ("LMCC") on April 23, 2007 and the comments of Gregory Zwicker, Biologist for NOAA National Weather Service, filed December 19, 2006.

At the outset, BMDDP appreciates the FCC's desire to minimize any impact antenna towers may have on migratory birds given that some studies indicate that migratory birds are prone to collision with antenna towers under certain circumstances. In order to minimize any adverse affects on migratory birds, the FCC has proposed "possible" action items concerning (a) the use of medium intensity white lighting in lieu of red obstruction lighting where practical, (b) restrictions or the imposition of additional requirements for the use of guy wires, (c) restrictions on tower height, as well as (d) requiring co-location and (e)

the filing of environinental assessments for new tower construction under Section 1.1307 of the Commission's Rules. For the reasons discussed below. BMDDP submits that these proposed action items are unnecessary. And in the event that the Commission concludes that antenna towers have a significant adverse effect on migratory birds, the Commission should, at most, encourage co-location where technically feasible.

In the event that any of these proposals is adopted, BMDDP urges the Commission to be certain that the adopted items are technically sound so that communications providers and small business tower owners are not unduly burdened with new requirements and constraints that make it impossible or unduly burdensome to either construct antenna towers or design their communications systems in an efficient manner.

I. There is a Genuine Dispute as to Whether Science Supports the Hypothesis that Certain Antenna Tower Configurations and Obstruction Lighting Systems are the Proximate Cause of Migratory Bird Deaths.

In releasing its Notice of Proposed Rulemaking ("NPRM") in the captioned proceeding, BMDDP notes that the Commission relies, in part, on scientific studies of Avatar Environmental LLC ("Avatar"), which was hired by the FCC to "assist the Commission in evaluating the quality and sufficiency of existing research." See Notice of Proposed Rulemaking, In the Matter of Effects of Communications Towers on Migratory Birds, (WT Docket No. 03-187) (FCC-06-164) (Rel. November 7,2006) at 4. While it appears that there is some science to

indicate that antenna towers could have an adverse affect on migratory birds, the science is inconsistent (and therefore, unreliable) due to flaws in study methods.' As a result, a government scientist from the National Oceanic & Atmospheric Administration ("NOAA") has called into question the efficacy of this science. **See** Comments of Gregory Zwicker, a biologist for NOAA Weather Radio All Hazards filed December 18,2006. In particular, NOAA questions whether the cause of death of the significant number of migratory birds is due to collision with antenna towers, as suggested in this proceeding, or whether the cause of death is in fact communications/power lines that have been electrically charged by local governments in order to reduce "roosting" on these lines as a means to reduce line breakage and service disruptions. NOAA Comments at 1. NOAA also questions whether the FCC's data takes into account other factors such as the reduction of the natural habitat for migratory bird predators (e.g., fox, possum, raccoon, snake,

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[1] In this regard, the Commission acknowledges that there is significant disagreement with the Avatar Report's conclusions to the extent that the report concluded that there is insufficient science on avian mortality to justify amending the Commission's Environmental Rules. See NPRM at para 28. In particular, the Commission notes that the Avatar Report was criticized by Land Protection Partners ("LPP") on behalf of the American Bird Conservancy, Interior Department, Humane Society and Defenders of Wildlife because the Avatar Report did not assess biological significance per species. LPP concluded that for each of the ten avian species killed most often at antenna towers, the estimated annual mortality was 490,000 to 4.9 million birds for each species. Id. at para. 27. The Commission noted further that the basis of LPP's data was in turn, criticized by the National Association of Broadcasters ("NAB") and the Cellular Telecommunications Internet Association ("CTIA") as being flawed because the data collection was uncoordinated and bias was shown in the selection of antenna towers to study (i.e., antenna towers greater than 600 feet AGL with avian mortality present). Id. at para 28.

etc.) through urbanization and construction of major roadway systems. Id. This is because NOAA believes that the number of migratory bird deaths due to collision with antenna towers would be statistically insignificant if it were off-set by the migratory birds that were no longer being killed due to the loss of their natural predators.[2] Id. Because of the questions raised by NOAA, it is critical that the Commission verify, as a condition precedent to any other regulatory action, the accuracy of its science in order to determine whether the migratory bird population is any worse off than it would otherwise be if there had not been a diminution of their natural predators or other adverse conditions that naturally occur during migration. And, should the data demonstrate that the migratory bird population is worse off, is the change statistically significant given the overall migratory bird population? If not, then no further action by the Commission is warranted.

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[2] The NPRM relies on avian population and mortality estimates from the United States Department of the Interior, Fish and Wildlife Service ("Interior Dept."). Based upon this data, it would appear that there approximately twenty billion migratory birds during the fall season in the United States and that four million to fifty million migratory birds are killed each year as a result of tower collisions. NPRM at para 6. Based upon this data, the mortality rate for migratory birds in the United States from all causes would be in the range of 0.005 percent, which is far less than that indicated by NAB and CTIA. The Interior Department's data does not indicate what percentage of these avian deaths was related to antenna tower strikes.

11. Any Regulatory Action Taken by the Commission Should be Minimized to Protect Incumbent Facilities and Promote Efficient Use of Spectrum.

In the event the Commission determines that certain types of antenna structures pose a credible threat to migratory birds, BMDDP urges the Commission to take a very cautious approach to regulation in order to ensure that human needs for safe and reliable communications are not compromised. As discussed above, it appears, based upon the numbers supplied by the Interior Department, that only 0.005 percent of the migratory bird population has been adversely affected by antenna towers. This miniscule percentage can hardly be deemed to be statistically significant. And, when balanced against human life the 0.005 percent purported avian mortality rate is less significant.

BMDDP supports LMCC and urges the Commission not to lose sight of the vital services that wireless communications and broadcast services provide to the public. If broadcasters are not able to construct antenna towers more than 200 feet above ground level ("AGL"), the signal propagation will be insufficient to broadcast news and other relevant information to large portions of population centers. Additionally, if carriers are limited to the installation of antennas at 200 feet AGL or less, they will be required to install additional antenna towers in order to achieve similar coverage patterns. These additional sites would be extremely expensive and require specialized equipment for simulcasting so that there is no co-channel interference.

The above considerations also apply to the design and implementation of public safety and critical infrastructure communications systems. The costs associated with the siting of additional antenna towers can be quite significant. Apart from regulatory costs associated with obtaining zoning approvals (assuming that zoning approval can be obtained for a site in a needed area), there are costs associated with land acquisition, construction of transmitter buildings, antenna towers, antenna costs, engineering costs, etc. that would not be required if the licensee could operate from a single antenna site.

In this regard, the Commission has requested comment on various options for addressing migratory bird collisions with antenna towers. With respect to the construction of new antenna towers, the Commission indicates that obstruction red lighting can have an adverse impact on migratory bird navigation under certain circumstances. NPRM at para 41. Like LMCC (Comments of LMCC at 5), BMDDP urges the Commission to follow the FAA's current practice, which is to recommend medium intensity strobe lighting in lieu of continuously burning red lights for new antenna towers. In those circumstances where medium intensity strobe lighting would be inappropriate (e.g., because of community concerns, etc.), the proponent for the antenna tower should be able to request that the FAA recommend red obstruction lighting, which the Commission would then adopt. This procedure would not require any amendment to the Commission's rules since both systems are consistent with the Rules.

For existing towers, the Commission should retain existing obstruction lighting requirements for existing antenna towers unless the owner proposes to change obstruction marking and lighting systems and requests approval to do so. To require all obstruction lighting systems to be changed from red to medium intensity strobe lighting will be prohibitively expensive, and in certain circumstances, physically impossible due to tower loading issues. Thus, medium intensity strobe systems are not compatible with existing red obstruction systems and tower owners will be required to replace fixtures, cabling, power supplies and mounting hardware in order to make the conversion. The costs for a single tower can be in the tens of thousands of dollars, depending upon the height of the affected tower. Finally, even if a tower owner desired to make the change, it may not be able to if the locality or the citizens of the community oppose the change.

III. Rule Section 1.1307 Should not be Amended.

The Commission should not amend Section 1.1307 to require the filing of an environmental assessment ("EA") for antenna towers in order to determine the potential impact that the proposed antenna tower would have on migratory bird collisions. Specific routes for all migratory birds are not known and development of rural areas can change flight plans and roosting areas over time. With a lack of clear scientific data for support, the inclusion of migratory birds in Section 1.1307 of the Commission's rules would only have the undesired effect of requiring the filing of an **EA** for all antenna tower construction. As a result, the Commission's resources would be unduly burdened and the process for constructing new towers

substantially delayed, especially for antenna towers that currently do not require notice to the FAA and registration with the FCC. See Part 17 of the Commission's Rules (47 C.F.R. Sec 17.01 ***et.*** *seq.*).

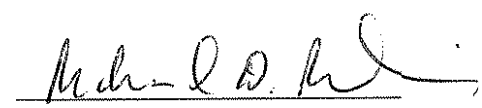
For small businesses, the requirement to prepare an EA for each and every proposed antenna tower would be financially unbearable. Depending upon the particular location and the amount of research required, the costs to prepare, file and prosecute an individual EA can amount to tens of thousands of additional dollars in consulting, engineering and legal fees, thereby potentially making the proposed antenna tower a non-economically viable proposition. See e.g., LMCC Comments at 7-8. While fewer antenna towers may be desirable in certain circumstances, it should be noted that the siting of antenna towers is difficult enough given citizen input to limit the placement of antenna towers away from residential areas, schools, parks, and other locations that can provide necessary coverage to the community. And, in circumstances where local governmental officials have granted approval for the siting and construction of the proposed antenna tower, the FCC's Environmental Assessment processes would provide opposition groups an opportunity to abuse the FCC's processes in their continued protest of the construction of the antenna tower. Accordingly, Section 1.1307 should not be amended.

IV. Conclusion.

For the foregoing reasons, the Commission should take no action with respect to the perceived impact that antenna towers may have on migratory birds. Accordingly, the proceeding should be terminated.

Respectfully submitted,

BLOOSTON, MORDKOFSKY, DICKENS, DUFFY & PRENDERGAST, LLP

By: 

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